NO. 56139-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN BECKMEYER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith C. Harper, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

While trapped in the bedroom area of his fifth wheel trailer, John Beckmeyer, a disabled man in his late fifties, was confronted by a much younger man, James McDonald, aiming a long gun at him. Defending himself, Beckmeyer shot McDonald, who died of his injuries. A jury—rejecting Beckmeyer's justifiable force defense—convicted Beckmeyer of second degree murder as well as related counts of second degree assault.[1]

However, Beckmeyer did not receive a fair trial based on the exclusion of key evidence. The trial court improperly excluded statements to medical providers describing McDonald's prior violence, which was crucial to the jury's understanding of Beckmeyer's subjective fear, a necessary component of a self-defense claim. Exclusion of such evidence

[1] As to these assault charges, the State relied in part on a theory of transferred intent; correspondingly, the jury was instructed that if Beckmeyer's use of force was justified as to the homicide, it could also find the use of force was justified as to the assault charges.

violated the rules of evidence as well as Beckmeyer's right to present a defense. And, because the exclusion prejudiced Beckmeyer's case under either an evidentiary or constitutional error standard, this Court should reverse Beckmeyer's second degree murder conviction, count 1, as well as the two related assault convictions relying on a theory of transferred intent, counts 2 and 3, and remand for a new trial.

In any event, where the trial court stated it wished to impose only mandatory legal financial obligations, the requirement that Beckmeyer pay the community custody supervision fee should be stricken from the judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court violated the rules of evidence and violated Beckmeyer's right to present a defense when it excluded Beckmeyer's statements to medical providers regarding fear of, and violent acts by, the decedent James McDonald.

2. The trial court erred when it ordered Beckmeyer to pay the community custody supervision feet after stating it was imposing only mandatory legal financial obligations.

3. Relatedly, defense counsel was ineffective in failing to object to imposition of the fee on the written judgment and sentence.

Related Issues for this Court

1. Where an accused raises the defense of justifiable force, a trial court should admit evidence supporting the accused's reasonable fear of the decedent, in part because it is necessary for the jury to "'stand as nearly as practicable in the shoes of the defendant, and from this point of view determine the character of the act.'"[2] Further, under the rules of evidence, statements made for medical diagnosis or treatment describing a source of harm, including identity of a domestic violence

[2] State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977) (plurality) (quoting State v. Ellis, 30 Wash. 369, 373, 70 P. 963 (1902)).

perpetrator, are admissible. Beckmeyer's statements to his and his girlfriend's medical providers a month before the incident describing prior violent acts by the decedent were admissible under the rules of evidence. They were also necessary to the jury's consideration of his justifiable force defense and, specifically, his subjective fear of the decedent. Did the trial court therefore err in excluding such evidence? Similarly, did the trial court's exclusion of the evidence violate Beckmeyer's right to present a defense?

2. Under the standard for reversal applicable to evidentiary errors, a trial error requires reversal if, within reasonable probabilities, the error affected the jury's verdicts. Under the constitutional standard, constitutional error requires reversal unless the State can demonstrate beyond a reasonable doubt that the error was harmless. Is reversal of counts 1-3 required under either standard?

3. Community custody supervision fees are not mandatory legal financial obligations; rather, they are waivable

based on the accused person's indigency. Where the trial court intended to impose only mandatory legal financial obligations, should the community custody supervision fee be stricken? Relatedly, was defense counsel ineffective in failing to object to the apparently inadvertent imposition of this legal financial obligation?

C. STATEMENT OF THE CASE

1. **Background and life on Marrowstone island property**

In 2017 Beckmeyer and his girlfriend Danielle Boucher moved to property on Marrowstone Island in Jefferson County after losing their Texas home to a hurricane. RP 1056, 1171, 1486-87. Beckmeyer's older sister Karen lived on the property with her elderly husband Aaron Benson. RP 1057, 1178, 1182, 1488. Karen had cancer. RP 1344.

Beckmeyer and Boucher helped care for Karen until she passed away. RP 1056. Due to their poor financial situation,

they remained on the property after Karen's death, living in a stationary "fifth-wheel" trailer. RP 1056, 1058.

Unfortunately, Beckmeyer's medical condition, already poor, worsened while he lived on the property. RP 1081. Among other difficulties, deterioration of Beckmeyer's spinal column had led to a series of back and neck surgeries, including one in early 2020. RP 1081, 1129-30; see also RP 1592-99 (testimony of treating physician Laura Wulff). Walking and climbing stairs were difficult for Beckmeyer. RP 1081, 1085, 1594.

Even so, Beckmeyer did his best to clean up the Benson property, which was littered with scrap metal and inoperable vehicles. RP 1061-62, 1182, 1296. He used a riding lawnmower—and a walker—to get around on the property. RP 1083-84, 1085. Boucher had her own medical issues; she became dependent on alcohol and frequently consumed significant amounts. RP 1059-60, 1065; see RP 1603-04 (testimony of Boucher's treating nurse practitioner Christine

Doyle). Boucher testified she needed to drink to function. RP 1130.[3]

Aaron Benson's granddaughter Randi and her boyfriend James McDonald, the decedent, also lived on the property. RP 1057-58. They resided in a motorhome parked across a grassy area from the fifth wheel until Randi's father passed away in early 2019. At that time, they moved into the house. RP 1063-64, 1178, 1230.

Randi and McDonald, who were in their early twenties, socialized with Beckmeyer and Boucher, who are older.[4] RP 1059-60, 1063-64, 1179. They barbecued together, drank, and occasionally shot guns recreationally. RP 1062-63, 1066-69,

[3] According to a defense medical expert, the brain of a heavy drinker produces chemicals to compensate for the sedating effects of alcohol. Thus, such a person can appear relatively unimpaired even with a high blood alcohol level. Due to the alteration in brain chemicals, such a person becomes physically dependent on alcohol, and they endanger their health when they *stop* drinking. RP 1627-34, 1646-48, 1652.

[4] As of the summer of 2020, Beckmeyer was in his late fifties, and Boucher was in her mid-thirties. RP 1052-54.

1182, 1186. Beckmeyer would operate two barbecue grills from his walker while the others hung out. RP 1086-87, 1095, 1434-37.

McDonald, however, had a violent, unpredictable streak that made Beckmeyer apprehensive. RP 1444, 1461. McDonald had exploded with anger and pointed a BB gun at Beckmeyer's head during an altercation about Beckmeyer's dog. RP 1075, 1124-26, 1461-64. The dog was injured (and eventually had to be euthanized) after McDonald—who had been tasked to watch the dog—failed to warn Beckmeyer that the dog was in the path of his car. Yet *McDonald* had become belligerent. RP 1072-78.

McDonald had also thrown Boucher to the ground[5] during an argument. RP 1078-80, 1126-27. That same evening, McDonald had behaved erratically in other ways, becoming upset with Randi and barging into Beckmeyer and Boucher's

[5] At trial, as with the BB gun incident, Randi minimized the incident involving Boucher. But Randi acknowledged McDonald had pushed Boucher. RP 1185.

fifth wheel. RP 1466-68. Boucher sought medical treatment for pain from the assault, although it turned out she had no broken bones. RP 1080, 1128; see also RP 1608-09 (testimony of treating nurse practitioner Doyle).

Further, McDonald had been violent toward Benson and damaged property during other altercations. RP 1343, 1464.

Both Boucher and Beckmeyer reported their concerns about McDonald, and how it affected their living situation, to medical providers. See CP 132-22 (medical records attached to defense motion). But the trial court excluded medical provider testimony regarding Beckmeyer's statements—made weeks before the incident—that would have corroborated Beckmeyer's post-shooting claims that he feared McDonald. CP 77-78, 82-83, 132-33, 233-36 (defense motions and response to State's motion); RP 130-33, 1259-66 (discussion by court and parties, and ultimate exclusion). The State repeatedly argued that Beckmeyer wasn't really afraid of McDonald and, rather, he shot him out of anger. E.g., RP 2111 (rebuttal argument).

2. **August 26, 2020 death of McDonald**

The evening of August 26, 2020, Beckmeyer and Boucher were barbecuing, as they often did, in the lawn area between the fifth wheel and Randi and McDonald's abandoned motorhome. RP 1092-94. Beckmeyer testified they had all planned to spend time together, RP 1431-32, but Randi and Boucher believed the gathering was impromptu. RP 1089, 1096, 1188.

At some point, Boucher turned up the volume on the music she was listening to. Beckmeyer asked her to turn it down. Boucher refused. Beckmeyer slapped her on the side of the head. RP 1097-99. Boucher, although not injured, was shocked and embarrassed. RP 1118. She held her head in her hands while Randi attempted to comfort her. RP 1099-1102.

McDonald stood up and attempted to grab Beckmeyer. RP 1118, 1445, 1503. Beckmeyer, despite his mobility issues, managed to dodge McDonald and retreated into the "cabover" bedroom area of the fifth wheel, where Beckmeyer relieved himself into a bottle. RP 1039, 1452-53. While pouring the

bottle out the bedroom area's louvered window, he was alarmed to see McDonald approaching the fifth wheel with a long gun. RP 1453-54, 1514, 1520-24. Beckmeyer believed it was a .22-caliber rifle or a shotgun; both could be found on the Marrowstone island property. RP 1454; see also RP 659, 671, 681 (Beckmeyer statement to responding police officer that McDonald was pointing a .22); RP 1037 (.22-caliber bolt action rifle found in motorhome). It turned out to be a 12-gauge shotgun. RP 952.

Beckmeyer fired his .22-caliber pistol out the louvered window near the bed. RP 1458-60, 1523; Ex. 288. He testified he was aiming at the ground. RP 1431; see also RP 681 (statement to responding police officer). However, the bullets struck higher; several hit the abandoned motorhome, which was located across the grassy area and about 38 feet from the window of the fifth wheel. RP 912, 923, 932-37, 1691.

Beckmeyer told a responding police officer that he shot McDonald because McDonald was coming at him with a rifle.

RP 661, 671-72, 681 (testimony of Captain Benjamin Stamper). Further, Beckmeyer said McDonald had a history of domestic violence. RP 661. McDonald had assaulted Beckmeyer's girlfriend about six weeks earlier. RP 681-82. However, as stated, the court excluded testimony by medical providers corroborating that Beckmeyer had previously expressed fear of McDonald. CP 77-78, 82-83, 132-33, 233-36; RP 130-33, 1259-66.

Boucher testified at Beckmeyer's trial. She was still sitting in her chair being comforted by Randi when she saw McDonald approach the barbecue area carrying a long gun. RP 1103, 2211.[6] While standing near Boucher, McDonald pointed the gun at the fifth wheel. RP 1115-16, 1120-21, 1123, 1133-34, 1137, 2213, 2215-16. At some point, Boucher saw the barrel

[6] A portion of Boucher's testimony initially was not transcribed because the recording was not supplied to the transcriptionist. The missing recording was eventually located and transcribed. It appears out of order, at pages 2211-17 of the consecutively paginated verbatim reports.

broken open, i.e., in a position to load ammunition.[7] RP 1113-14, 1121, 1133-34.

Suddenly, Randi pushed Boucher to the ground, and shots rang out. RP 1103-04, 2211, 2213. Boucher saw red marks spread on McDonald's shirt. RP 1106-07, 1134. Boucher attempted to administer first aid, but McDonald died while Randi was on the phone with 9-1-1. RP 1107-10.

McDonald had been shot twice in the chest. RP 778. The bullets passed through his lungs; one ruptured the pulmonary artery, which caused massive blood loss. RP 788-89, 795-96. The medical examiner believed McDonald would have spit up blood with the next breath after being struck. RP 789-90.

McDonald's shotgun was found in the grass just south of the picnic table. The barrel was slightly open. RP 952-55, 960, 991-92; Ex. 27. A State's witness believed McDonald was shot when he was south of the picnic table; that he then turned toward

[7] See also RP 1155-57 (police officer's testimony explaining process for loading 12-gauge shotgun McDonald was carrying).

the picnic table; and, finally, that he made his way to the east before collapsing. RP 951, 953, 986. Further, the State's witness believed the blood on the picnic table represented drips that fell directly from the gunshot wounds. RP 987-88, 993.

In contrast, a defense forensic expert believed the blood marks on the picnic table were too large to have resulted from gravity alone and were likely the result of expectoration (coughing) by McDonald as he ran from a position nearer to the fifth wheel—and Beckmeyer. RP 1738-40, 1774, 1776, 1789.

Boucher, a heavy drinker at the time, had consumed alcohol before the incident. RP 737, 757-60. Testing after the incident revealed a high blood alcohol level. RP 748-49, 841. But, in support of Boucher's account of the incident, Beckmeyer presented expert medical testimony that an individual habituated to large amounts of alcohol would be nowhere near as impaired as a novice drinker because the brain of such a person produces chemicals to offset the presence of alcohol. RP 1627-31, 1633-34.

Randi offered a somewhat different account. According to Randi, while she was consoling Boucher, she heard Beckmeyer say he was going to get his ".45"—.45-caliber pistol—although she did not feel compelled to leave the area. RP 1188, 1193-94. Boucher, in contrast, did not hear Beckmeyer say he was going to obtain a gun. RP 1132.

According to Randi, the next thing she knew, McDonald was standing between the picnic table, a riding lawnmower, and a parked car, holding a shotgun. RP 1188, 1196, 1217. McDonald announced that he was going to "defend himself." RP 1215-16, 1249.

Randi saw a black object emerge from the window of the fifth wheel. RP 1888. She pushed Boucher to the ground and "hit the deck" herself before hearing five gunshots. RP 1188, 1196. Like Boucher, Randi looked up and saw red marks on McDonald's shirt. RP 1188-89. Randi testified she had focused on the black object emerging from the fifth wheel and did not

know if McDonald was loading the shotgun or pointing it at the fifth wheel. RP 1245.

After McDonald was shot, Randi ran to the house and called 9-1-1. RP 1245-46, 1251. Beckmeyer also called 9-1-1. He reported to the dispatcher that he had shot out his window because McDonald had pulled a gun on him. RP 1323-27.

3. **Beckmeyer statements to police; ruling to exclude prior statements regarding fear of McDonald.**

Police were summoned to the scene and arrested Beckmeyer, who fell while police escorted him from the fifth wheel. After undergoing tests at the hospital, Beckmeyer agreed to speak with police. RP 1334, 1337-41, 1482-83.

In a police station interview, Beckmeyer explained that earlier that night, he had been barbecuing but had to retreat to the fifth wheel after McDonald got in his face and tried to grab him. RP 1341.

Beckmeyer had additional reason to fear McDonald—the younger man previously assaulted Boucher and behaved

erratically following the injury to Beckmeyer's dog. RP 1342-43, 1346, 1348, 1372. McDonald had also damaged property, breaking windows and stabbing the door of his motorhome. RP 1343. Beckmeyer said he had discussed this with a social worker and medical providers. RP 1342.

After narrowly avoiding McDonald's attempt to grab him, Beckmeyer made it to the sleeping area of the fifth wheel and lay down. RP 1357, 1380-81. But then, McDonald appeared in the barbecue area with the long gun. RP 1349. McDonald pointed the gun toward the window of the sleeping area where Beckmeyer had retreated. RP 1349-50, 1352, 1367. Beckmeyer heard Randi and Boucher "freaking out" and McDonald yelling something. RP 1350-52, 1388.

Feeling trapped in his thin-walled residence,[8] Beckmeyer fired his .22. pistol out the window. RP 1349, 1352, 1367, 1379,

[8] The defense forensic expert testified that both "shot" fired by a shotgun and a .22-caliber bullet fired by a rifle could pierce the walls of the fifth wheel and harm an individual inside. RP 1745-54, 1817.

1415-16. Beckmeyer believed he had fired downward; the goal was simply to scare off McDonald. RP 1352, 1354. At the time, Beckmeyer did not believe he was firing near the women. RP 1367. Beckmeyer was not certain whether he had wounded McDonald because Beckmeyer saw him run away. RP 1374.

At trial, Beckmeyer testified about the incident in a manner largely consistent with his statement to police. E.g., RP 1444-49, 1453-61, 1513-26, 1538. However, in contrast to his statements that evening, Beckmeyer admitted to hitting Boucher during the music dispute. He previously denied doing so because he was embarrassed. RP 1360, 1442-43.

4. **Charges, verdicts, and sentence**

The State charged Beckmeyer with first degree murder or, alternatively, second degree murder (McDonald); two counts of first degree assault (firing near Benson and Boucher); and fourth degree assault (hitting Boucher). As to the first three charges, the State alleged Beckmeyer was armed with a firearm. CP 6-9.

The court instructed the jury on the defense of justifiable use of force as to the first three counts. CP 333-37. As to the two assault charges, counts 2 and 3, the legal theory was that because the State was relying on a theory of transferred intent, if the force used against McDonald was justified, the assaults—even if inadvertent—were also justified. CP 338-39.

The court also instructed the jury on lesser charges of manslaughter (count 1) and second degree assault (counts 2 and 3). CP 327, 332, 349-50.

The jury convicted Beckmeyer of second degree murder[9] and two counts of second degree assault,[10] as well as the fourth degree assault of Boucher. As to the first three charges, the jury found Beckmeyer was armed with a firearm.[11] CP 361-76.

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[9] RCW 9A.32.050(1)(a).

[10] RCW 9A.36.021(1)(c) (assault with a deadly weapon).

[11] RCW 9.94A.533(3).

Rejecting a request for an exceptional sentence downward, CP 393-409, the trial court sentenced then 60-year-old Beckmeyer to 347 months of confinement, which included a base sentence of 215 months plus 132 months of firearm enhancements. CP 439[12] (page 4 of amended judgment and sentence).

The court also imposed 36 months of community custody. CP 440[13] (page 5 of amended judgment and sentence). Among other conditions, the judgment and sentence ordered that Beckmeyer pay community custody supervision fees, despite the trial court stating it would only impose mandatory legal financial obligations because of Beckmeyer's indigency. CP 440; RP 2204.

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[12] Undersigned counsel will file a supplemental designation of clerk's papers designating the amended judgment and sentence—which appears to correct scrivener's errors as to the length of sentence—on June 27, 2022. This reflects the anticipated pagination.

[13] This is the anticipated pagination.

Beckmeyer timely appeals. CP 420.

D. ARGUMENT

1. **The trial court violated the rules of evidence and denied Beckmeyer his right to present a complete defense when it excluded testimony regarding his statements to medical providers establishing his longstanding fear of the decedent.**

The trial court erred when it excluded testimony regarding Beckmeyer's statements to medical providers, which would have established his longstanding fear of McDonald, and which were essential to his defense. Such evidence was an essential component of the defense because it was necessary for the jury to evaluate the subjective component of justifiable force—as our Supreme Court has stated, to stand as nearly as practicable in the defendant's shoes when evaluating the defendant's use of deadly force. The error was not harmless under either evidentiary or constitutional error standards as to counts 1 through 3. This Court should, therefore, reverse those convictions and remand for a new trial.

a. Foundational law and standards of review

The trial court's ruling violated the rules of evidence and Beckmeyer's right to present a defense. Where an accused person argues that a trial court's decision to exclude evidence violated the right to present a defense, this Court undergoes a one- or two-step process, depending on the result of the first step.

First, this Court examines whether the trial court's evidentiary decision was an abuse of discretion. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds, including error of law. See Wash. State Physicians Ins. Exch. & Assn v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). If the trial court abused its discretion, and such error prejudiced the defendant—affected the outcome of trial—the inquiry ends, and the defendant has prevailed. Jennings, 199 Wn.2d at 59.

If, however, the defendant has not shown prejudice under the evidentiary standard, this Court next examines whether the

trial court's decision violated the right of the accused to present a defense, reviewing that matter de novo. Id. at 58.

The right of an accused person to present a complete defense is guaranteed by both the federal and state constitutions. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. A trial court does not violate an accused's constitutional right to present a defense by excluding *irrelevant* evidence. But, assuming evidence meets the relatively low bar for relevance, the reviewing court must then evaluate whether the evidence was "so prejudicial as to disrupt the fairness of the factfinding process at trial," and, if so, whether the

State's interest in excluding the prejudicial evidence outweighs the defendant's need to present it. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983); accord State v. Orn, 197 Wn.2d 343, 353, 482 P.3d 913 (2021). As for the evaluation of prejudice, the State has the burden of showing that the evidence is not just prejudicial to its case, but rather so prejudicial as to disrupt the fairness of the fact-finding process. State v. Darden, 145 Wn.2d 612, 621-22, 41 P.3d 1189 (2002) (citing Hudlow, 99 Wn.2d at 15). If the State fails to show this, the analysis ends, and the exclusion of the relevant, nonprejudicial evidence violated the defendant's Sixth Amendment right to present a defense; that exclusion is then subject to constitutional harmless error analysis. Orn, 197 Wn.2d at 356.

If, on the other hand, the evidence is prejudicial, the State must show that it had "a compelling interest to exclude [the] prejudicial or inflammatory evidence," i.e., an interest that outweighs the defendant's need to present it. Darden, 145 Wn.2d

at 621 (citing Hudlow, 99 Wn.2d at 15 (adopting "compelling interest" standard)).

Two additional points must be made. For a constitutional violation to occur, the exclusion of such evidence need not eliminate the accused person's "entire defense." Jennings, 199 Wn.2d at 63-65. Moreover, as stated, "prejudice" to the State is not merely that the prosecution would find the evidence inconvenient or that it would tend to undermine its case. See Hudlow, 99 Wn.2d at 15.

b. The exclusion of testimony regarding Beckmeyer's disclosures to medical providers violated the rules of evidence and affected the outcome of trial on counts 1-3.

In the present case, the trial court's ruling violated the rules of evidence. And the error was not harmless under the related standard for reversal.

Here, Beckmeyer's defense at trial was that the force used against McDonald (and, inadvertently against Boucher and Benson) was justifiable because Beckmeyer feared for his life.

An important component of Beckmeyer defense was his ongoing fear of McDonald. There was no dispute that McDonald was armed with a firearm when Beckmeyer shot him. But evidence differed as to where McDonald stood in relation to the fifth wheel; whether he pointed the gun at the fifth wheel; and, relatedly, whether his gun was ready to fire. As will be discussed, self-defense has both objective and subjective components. To evaluate Beckmeyer's subjective fear of the armed McDonald—and to rebut the State's claim that it was feigned—the jury was entitled to hear that Beckmeyer's expressed fear of McDonald was not simply fabricated to justify his actions, but rather longstanding. And this evidence was admissible through the medical providers themselves.

Turning first to the law regarding the lawful use of force, under the law of this state, homicide is lawful when the defendant reasonably feared the decedent was about to inflict death or great personal injury, and there is imminent danger that injury will be

accomplished. RCW 9A.16.050(1); State v. Brightman, 155 Wn.2d 506, 520, 122 P.3d 150 (2005).

As Washington courts have interpreted the relevant statutes, there are three elements to a claim of lawful use of force: (1) The defendant subjectively feared imminent harm; (2) this fear was objectively reasonable; and (3) the defendant exercised no more force than reasonably necessary. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). Further, an imminent danger is not necessarily an immediate danger, but instead incorporates the circumstance of a danger "'hanging threateningly over one's head: menacingly near.'" State v. Janes, 121 Wn.2d 220, 241, 850 P.2d 495 (1993) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1130, 1129 (1976)).

As suggested by the foregoing language, the right to use deadly force incorporates both subjective and objective elements. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The objective portion requires "the jury to use this information to determine what a reasonably prudent person

similarly situated would have done." Id. But the subjective portion of the standard is important as well and must be made apparent to the average juror. Id. at 477.

In considering the use of force, the jury must therefore consider all of the facts and circumstances known to the defendant. State v. Allery, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984) (evidence of decedent's pattern of violence, not just actions immediately preceding death, relevant to self-defense claim). In the case of a defendant who has been subjected to a history of violent behavior, the jury should consider the defendant's actions in light of that history. Id.

Put another way, because the "'vital question is the reasonableness of the defendant's apprehension of danger,'" the jury must stand "'as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977) (plurality opinion) (quoting State v. Ellis, 30 Wash. 369,

373, 70 P. 963 (1902)); State v. Duarte Vela, 200 Wn. App. 306, 319, 402 P.3d 281 (2017).

Evidence is relevant and admissible if it demonstrates the defendant's reason for fear and the basis for using force. State v. Walker, 13 Wn. App. 545, 549, 536 P.2d 657 (1975). Thus, evidence of an alleged victim's violent actions may be admissible to show the accused's state of mind at the time of the crime and to indicate whether they had reason to fear bodily harm. State v. Cloud, 7 Wn. App. 211, 218, 498 P.2d 907 (1972) (quoting State v. Adamo, 120 Wash. 268, 269, 207 P. 7 (1922)).

As the foregoing indicates, it is crucial that the jury understand the defendant's state of mind in regard to the danger he faces. Wanrow, 88 Wn.2d at 235. Finally, and perhaps most crucially, "[w]hen a defendant raises self-defense, the State bears the burden to disprove it" beyond a reasonable doubt. State v. Jordan, 158 Wn. App. 297, 301, 241 P.3d 464 (2010), aff'd, 180 Wn.2d 456, 325 P.3d 181 (2014).

Turning next to the principles applicable to the evidence itself, "[h]earsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Whether an out-of-court statement is hearsay depends on the purpose for which the statement is offered. Duarte Vela, 200 Wn. App. at 319.

Specifically, evidence is not excluded as hearsay if it is a statement of a declarant "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4).

"There is a generally accepted two-part test to aid in deciding whether statements proposed for admission under ER 803(a)(4) are reliable: (1) was the declarant's apparent motive consistent with receiving medical care; and (2) was it reasonable for the physician to rely on the information in diagnosis or

treatment." State v. Lopez, 95 Wn. App. 842, 849, 980 P.2d 224 (1999).

Appellate courts hold that, although not always admissible under the rule, statements attributing fault in the case of household violence[14] are pertinent to preventing reinjury, and thus such statements are reasonably pertinent to diagnosis and treatment. E.g., State v. Sims, 77 Wn. App. 236, 239, 890 P.2d 521 (1995), abrogated on other grounds by State v. Burke, 196 Wn.2d 712, 478 P.3d 1096, cert. denied, 142 S. Ct. 182 (2021); State v. Butler, 53 Wn. App. 214, 221, 766 P.2d 505 (1989).

As one federal court stated, discussing the analogous federal rule,

> All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily

[14] Beckmeyer acknowledges the individuals did not technically live under the same roof; however, from the testimony and the record, the various households on the Benson property of necessity functioned as one larger unit. E.g., RP 1432.

> differ when the abuser is a member of the victim's family or household. . . . In short, the domestic sexual abuser's identity is admissible under [Fed. R. Evid.] 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes "reasonably pertinent" to the victim's proper treatment.

United States v. Joe, 8 F.3d 1488, 1494-95 (10th Cir.1993), cert. denied, 510 U.S. 1184 (1994). Although that case involves sexual abuse occurring in a household, the logic applies equally to household nonsexual violence.

Further, ER 803(a)(4) does not require that the statements be made by the person receiving medical treatment. State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001); 5C Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 803.20 (6th ed.) ("[T]here is nothing in [ER803(a)(4)] to suggest that the hearsay exception applies only to statements describing the patient's *own* symptoms or medical history. The instant hearsay exception may apply, for example, . . . to statements by some other third person, who was seeking to convey information about a patient to a physician.").

Here, the court ruled that Beckmeyer's statements were not related to medical diagnosis or treatment and were otherwise inadmissible through the providers. RP 1265-66. That ruling was incorrect. Beckmeyer's statements expressing his concerns to both Wulff and Doyle—who both testified about other matters—were admissible under the hearsay exception because they were pertinent to treatment.

As the cited cases indicate, safety planning is part of treatment of domestic abuse victims. Indeed, "[m]edical scholarship confirms that identifying attackers is integral to the standard of care for 'medical treatment' of domestic abuse victims." Ward v. State, 50 N.E.3d 752, 761 (Ind. 2016). For example, "[d]octors and nurses in various clinical settings—including emergency room, primary care, surgery, and mental health facilities—are instructed they 'must be prepared to engage patients around the issue of [Intimate Partner Violence] and provide assessment and referral.'" Id. (quoting Nancy Sugg, MD, MPH, Intimate Partner Violence: Prevalence, Health

Consequences, and Intervention, 99 MED. CLIN. N. AM. 629, 640 (2015)). Experts urge doctors and nurses to acknowledge violence, assess patient safety, refer the victim for additional treatment or services, and document the injuries and the abuser. Ward, 50 N.E.3d at 761 (citing Sugg, 99 MED. CLIN. N. AM. at 641-44).

The statements contained in the medical reports, which could have been relayed by the testifying providers, were not hearsay because they were reasonably pertinent to diagnosis or treatment. ER 803(a)(4). As for the statement to Doyle, Boucher's treating nurse practitioner—a month before the incident, at an appointment for Boucher's injuries, Boucher said she was feeling unsafe at home and attempting to avoid McDonald. Beckmeyer told Doyle that he had experienced McDonald's violence as well. CP 132. Beckmeyer's statement was relevant to treatment and safety planning for Boucher, who had been assaulted by McDonald, a member of her household. RP 1078-80, 1126-27; see also 5C WASH. PRAC. § 803.20 (ER

803(a)(4) also applies to statements by third person seeking to convey information about a patient to a physician).

As for the statement to Dr. Wulff, a month before the incident, Beckmeyer told his treating provider that he was experiencing domestic violence by McDonald to the extent that he felt compelled to stay in motel. CP 133. This was relevant to safety planning for the physically vulnerable Beckmeyer because the potential source of harm was a member of his household. The standard of care requires no less. See Ward, 50 N.E.3d at 761. Therefore, it was admissible under ER 803(a)(4). The statement to Wulff was, arguably, also admissible under ER 803(a)(3), which provides that "statements of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" are not excluded by the rule barring hearsay. See CP 77-78, 234-35 (defense motion and response).

Returning to the overarching reason for the admission, such evidence is relevant to a jury's full understanding the

defendant's state of mind in regard to the danger he faces. Wanrow, 88 Wn.2d at 235; cf. Duarte Vela, 200 Wn. App. at 320 (decedent Menchaca's "past domestic violence" was not admissible to show that the allegation was true, "but rather for the very relevant purpose of showing the reasonableness of" defendant's fear of decedent).

The trial court's exclusion of the statements to medical providers was erroneous under the evidentiary rules and established law relating to justifiable use of force. Moving to the next question for this Court, it was also prejudicial to the defense. Such an error is considered prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been different. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Here, pointing to inconsistencies in Beckmeyer's statements, the State—which bore the full burden of disproving lawful use of force—argued that Beckmeyer was dishonest about feeling fearful of McDonald. RP 2028-31, 2046 (closing

argument); RP 2111 (rebuttal). According to the prosecutor, rather than feeling fearful, Beckmeyer felt anger toward McDonald. And, on the evening in question, he intended to harm McDonald. RP 2049. In contrast, Beckmeyer's statements to medical providers conveying such apprehension long before the events in question were likely to persuade the jury that the Beckmeyer's fear of McDonald was not a recent fabrication and that Beckmeyer's force was rooted in fear—and therefore justified under the law. This was true as to count 1. It was also true as to counts 2 and 3, the defense to which flowed from the viability of Beckmeyer's defense as to count 1. See CP 333-39.

The trial court erred in excluding the statements, and the error was prejudicial as to counts 1-3. This Court should reverse those counts and remand for a new trial.

c. The trial court's exclusion of the evidence also violated Beckmeyer's right to present a complete defense, and the State cannot demonstrate that the error was harmless beyond a reasonable doubt.

Should this Court disagree that the evidentiary error was prejudicial under the evidentiary standard, it must proceed to the next inquiries—whether prohibiting providers from testifying about Beckmeyer's statements violated his constitutional right to present a complete defense, and whether the State can demonstrate that such constitutional error was harmless beyond a reasonable doubt. Here, the trial court's exclusion of the evidence deprived Beckmeyer of his right to present a complete defense, and the error was not harmless beyond a reasonable doubt.

The court's exclusion of the evidence violated Beckmeyer's constitutional right to present a complete defense under the Hudlow test, which the Supreme Court recently reaffirmed in Orn and Jennings.

First, the evidence was relevant; evidence that establishes the reasonableness of a defendant's fear of a decedent is "highly probative." Duarte Vela, 200 Wn. App. at 320.

Where, as here, such evidence is relevant, a reviewing court must then weigh the accused's right to produce such evidence against the State's interest in limiting the prejudicial effects of that evidence on the fact-finding process. Hudlow, 99 Wn.2d at 16; accord Orn, 197 Wn.2d at 353. The State has the burden of showing that the evidence is so prejudicial as to disrupt the fairness of the fact-finding process. Darden, 145 Wn.2d at 621-22. If the State fails to show this, the analysis ends, and the exclusion of the relevant, nonprejudicial evidence violated the defendant's Sixth Amendment right to present a defense. Orn, 197 Wn.2d at 356. This Court must then evaluate whether the State can prove the violation of rights was harmless beyond a reasonable doubt. Id. Here, there was no countervailing State interest—the State cannot demonstrate the evidence was "so prejudicial as to disrupt the fairness of the fact-finding process."

Hudlow, 99 Wn.2d at 15; see Wilson v. Olivetti N. Am., Inc., 85 Wn App. 804, 814, 934 P.2d 1231 (1997) (prejudice is unfair "only if it has the capacity to skew the truth-finding process"). Rather, Beckmeyer's statements to providers presented a fuller picture of the household dynamics, the threat of violence posed by McDonald, and Beckmeyer's fear. This was not disruptive, inflammatory, or likely to confuse jurors. Cf. Hudlow, 99 Wn.2d at 5, 15-16 (excluding rape complainants' prior sexual history as "loose" women because not only was it irrelevant to issue of their consent, but it was also damaging and disruptive to the pursuit of justice for rape complainants). In summary, under the Hudlow test, recently reaffirmed by the Supreme Court, exclusion of the evidence violated Beckmeyer's right to present a complete defense.

Nonetheless, Beckmeyer acknowledges that the jury heard his testimony and his statement to police that he feared the armed McDonald the night in question and acted to save his own life. Thus, exclusion of the evidence did not eliminate his *entire* claim

that the force he used was justified under the law. But, as the Supreme Court recently clarified, in order for a constitutional error to occur, a defendant need not show that an adverse ruling eliminated their "entire" defense. Jennings, 199 Wn.2d at 63-674. And here, the jury primarily heard statements expressing fear made after the incident. Beckmeyer was entitled to present, and the jury was entitled to learn, that Beckmeyer's fear of McDonald was longstanding—not a recent fabrication.

Turning to the final question for this Court, "[a]n error is harmless and not grounds for reversal if the appellate court is assured [by the State] beyond a reasonable doubt that the jury would have reached the same verdict without the error." State v. Romero-Ochoa, 193 Wn.2d 341, 347, 440 P.3d 994 (2019). In the present case, the State cannot demonstrate the error was harmless beyond a reasonable doubt.

As indicated, the State bore the full burden of disproving beyond a reasonable doubt that Beckmeyer's use of force was lawful. Jordan, 158 Wn. App. at 301. As part of its burden, the

State was required to disprove that Beckmeyer subjectively feared imminent harm. E.g., Werner, 170 Wn.2d at 337. The jury heard McDonald was armed with a long gun and Beckmeyer was cornered in the bedroom of his thin-walled fifth wheel. The State attempted to persuade the jury that despite Beckmeyer's statements the night of the incident and at trial, Beckmeyer wasn't truly afraid of McDonald and didn't need to act. But Beckmeyer was not allowed to present provider testimony, which would have persuasively demonstrated his fear of McDonald was not a recent or post hoc fabrication. Rather, it was longstanding. Such evidence was necessary for the jury to stand "as nearly as practicable in the shoes of [the] defendant, and from this point of view determine" whether the use of force was justified. Wanrow, 88 Wn.2d at 235 (internal quotation marks omitted); see also Allery, 101 Wn.2d at 595 (history of dynamics of prior relationship between household members—in that case, spouses—was relevant to defendant's subjective fear of decedent).

The State cannot demonstrate beyond a reasonable doubt that the error was harmless. This Court should reverse counts 1 through 3 and remand for a new trial.

2. **The community custody supervision fee should be stricken because it is a discretionary legal financial obligation, which the trial court intended to waive. Further, defense counsel was ineffective for failing to object to the written order.**

As indicated, the trial court imposed a term of community custody as part of the sentence in this case. CP 440 (page 5 of amended judgment and sentence). The judgment and sentence lists as a condition of community custody that Beckmeyer must "[p]ay supervision fees as determined by [the Department of Corrections (DOC)]." CP 440 (condition 7). But appellate courts now recognize that the community custody supervision fee is a discretionary legal financial obligation. And the trial court wished to waive all discretionary legal financial obligations. RP 2204. This Court should, therefore, remand for the trial court to strike the supervision fee. Further, defense

counsel was ineffective for failing to object to imposition of the fee, which was likely inadvertent.

"Conditions of community custody may be challenged for the first time on appeal." State v Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

Trial courts have an obligation to conduct an individualized inquiry into a defendant's current and future ability to pay discretionary legal financial obligations before imposing them at sentencing. State v. Ramirez, 191 Wn.2d 732, 750, 426 P.3d 714 (2018). RCW 10.01.160(1) provides additional guidance. It authorizes a court to impose costs on a convicted defendant. But this general authority is discretionary; the statute states the court "may require the defendant to pay costs." RCW 10.01.160(1). "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." RCW 10.01.160(3). This statute defines an "indigent" person as one (a) who receives certain forms of public assistance, including

disability benefits, (b) who is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125 percent or less than the federally established poverty guidelines, or (d) whose "available funds are insufficient to pay any amount for the retention of counsel" in the matter before the court. RCW 10.101.010(3).

"The legislature . . . and our Supreme Court have made it clear that discretionary [legal financial obligations] should be waived for an indigent defendant." State v. Reyes-Rojas, noted at 15 Wn. App. 2d 1023, 2020 WL 6708241, at *3 (2020) (unpublished decision).

Beckmeyer is indigent under RCW 10.101.010(3)(a) *and* (c) because he received disability benefits and because he was not employed. CP 432. The trial court appropriately announced that it would only impose the "mandatory minimum" fines, or $700. RP 2204; see CP 415, 441 (page 6 of judgment and sentence and amended judgment and sentence, imposing victim assessment, domestic violence penalty assessment, and DNA

collection fee, all denoted "mandatory" on judgment and sentence paperwork).[15]

Despite Beckmeyer's indigence, and the court's apparent desire to waive all discretionary legal financial obligations, preprinted language on the judgment and sentence—located separately from other listed legal financial obligations—requires

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[15] Although the domestic violence fee is technically waivable, it is not waivable based on indigency and was not waivable under the circumstances:

> The domestic violence penalty assessment statute encourages judges to inquire . . . whether imposition of an assessment on the defendant will impact the victim. RCW 10.99.080(5). It does not require courts to examine the assessment's effect on the defendant [themself]. See id. The statute's focus on hardship to the victim indicates that courts may decline to impose the assessment if doing so would hinder the defendant's ability to meet financial obligations to the victim, such as restitution or child support. But if the assessment does not negatively impact the victim, then the penalty may be ordered without further concern for the defendant's financial circumstances or ability to pay.

State v. Smith, 9 Wn. App. 2d 122, 127-28, 442 P.3d 265 (2019).

Beckmeyer to pay "supervision fees" as determined by DOC. CP 440.

The judgment and sentence does not cite legal authority for this requirement. But RCW 9.94A.703(2)(d), the statute discussing allowable community custody conditions, appears to authorize it. Nonetheless, the statutory language and recent case law establish that these fees are discretionary. Subsection (2) of the statute is "**Waivable conditions**" and provides that, "Unless waived by the court, . . . the court shall order an offender to: . . . (d) [p]ay supervision fees as determined by [DOC]." RCW 9.94A.703(2)(d).

Citing this statutory language, this Court has noted the fee is discretionary. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n. 3, 429 P.3d 1116 (2018) (quoting RCW 9.94A.703(2)(d)), review denied, 193 Wn.2d 1007 (2019); accord State v. Spaulding, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020).

Division One also recognized the fee is discretionary and ordered the fee stricken in circumstances like those in the present

case. State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022 (2020).

The Supreme Court cited Dillon with approval in State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021), and ordered that such fees be stricken under similar circumstances.

Here, the trial court ordered that only mandatory fees be imposed. But then it failed to waive one discretionary fee, found in a separate section of the judgment and sentence, far from other legal financial obligations. See Dillon, 12 Wn. App. 2d at 152 ("it appears that the trial court intended to waive all discretionary [legal financial obligations], but inadvertently imposed supervision fees because of its location in the judgment and sentence"). As did the courts in Dillon and Bowman, this Court should remand for the trial court to strike the supervision fee from the judgment and sentence.

In the alternative, defense counsel was ineffective for failing to alert the court that that the written judgment and sentence did not waive the fee as the court apparently intended.

Both the federal and the state constitutions guarantee every accused person the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This Court reviews de novo an ineffective assistance claim. Id. at 689. Further, this Court will consider a claim of ineffective assistance of counsel for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To prevail a claim of ineffective assistance, an appellant must show both deficient performance and a reasonable probability of resulting prejudice. Id.

Beckmeyer can demonstrate both deficient performance and prejudice. As for the first criterion, deficient performance: By the original August 2021 sentencing hearing, decisional law clearly established that the community custody supervision fee was discretionary. For example, Division One's decision in Dillon had been issued more than a year earlier. And this Court had decided Spaulding nine months prior to the original sentencing hearing. Counsel was therefore deficient for failing

to bring the matter to the court's attention. See Kyllo, 166 Wn.2d at 868 (counsel has duty to be aware of existing case law).

As for the second, prejudice: Counsel's failure to alert the trial court that it was imposing a discretionary fee, despite the court's stated intention, was prejudicial to Beckmeyer. Had counsel made the argument, the trial court was likely to waive the fee on the written judgment and sentence based on indigency. The trial court waived every other discretionary legal financial obligation. Thus, had counsel objected and pointed out the stray discretionary legal financial obligation, it is likely the court would have stricken it from the judgment and sentence.

For either or both reasons, this Court should remand for the trial court to strike the community custody supervision fee.

E. CONCLUSION

The trial court violated the rules of evidence and denied Beckmeyer his right to present a defense when it excluded testimony regarding Beckmeyer's statements to medical providers addressing his fear of, and violent acts by, the

decedent. The exclusion undermined his justifiable force defense as to counts 1 through 3. This Court must therefore reverse on those counts and remand for a new trial.

In any event, the trial court erred when it required Beckmeyer to pay the community custody supervision fee after stating it would impose only mandatory legal financial obligations. Alternatively, defense counsel was ineffective for failing to alert the trial court to the apparently inadvertent imposition of the fee. This Court should order the fee stricken.

I certify this document contains 8,267 words, excluding those portions exempt under RAP 18.17.

DATED this 27th day of June, 2022.

Respectfully submitted,

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